

[APPELLATE CRIMINAL JURISDICTION]

MURRAY-AYNSLEY, J.

July 22, 1938.

ABDUL WAHAB v. PUBLIC PROSECUTOR.

(PERAK MAGISTRATE'S CRIMINAL APPEAL

No. 32 of 1938)

Penal Code, s. 406—criminal breach of trust—money received by accused to which he has no right to receive.

When money is given to a person in his official capacity, whether he has any right to take it or not, he is entrusted with it within the meaning of Section 406 of the Penal Code.

MAGISTRATE'S CRIMINAL APPEAL.

Taun Haji Abdul Wahab for appellant.

R. M. Cluer, Deputy Public Prosecutor, for respondent.

Cur. Adv. Vult.

Murray-Aynsley, J.—In this case the Appellant was convicted of four charges under Section 406 of the Penal Code.

The facts are quite simple. The Appellant was a Forest Ranger and as such collected the sums in question. It appears that the Appellant had no right whatever to receive the sums in question which were for matters, viz compensation for encroachments made by those persons paying them, for which the department would not have taken money. Having so taken the money the Appellant appropriated it. Now although on the facts it is possible that the Appellant might have been convicted of obtaining the money by false pretences or of some other offence, I am of opinion that when money is given to any person in his official capacity, whether he has any right to take it or not, he is entrusted with it within the meaning of the section.

The appeal must therefore be dismissed.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

MURRAY-AYNSLEY, J.

October 10, 1938.

HAJI OSMAN v. NG AH SIEW.

(PERAK MAGISTRATE'S CIVIL APPEAL

No. 30 of 1938).

I. O. U's. and other document—execution by illiterate persons—principles on which documents should be dealt with by Court.

Principles on which documents alleged to have been executed by illiterate persons should be dealt with by a Court considered.

MAGISTRATE'S CIVIL APPEAL.

This was a claim on an I.O.U. The defence was that the alleged I.O.U. was forged. The Defendant was illiterate and the document was signed by means of a thumb mark which was admittedly that of the Defendant. The Defendant however alleged that some years previously to the alleged date of the I.O.U., he gave powers of attorney to the Plaintiff, also signed with a thumb-mark, and at that time made a thumb-mark on a blank piece of paper which was subsequently without authority converted into the I.O.U. The Magistrate gave judgment for the Plaintiff and the Defendant appealed.

This case is reported only on the point as to the principles on which documents alleged to have been executed by illiterate persons should be dealt with by a Court.

George Terrell for Appellant—Defendant.

J. L. Woods, for Respondent—Plaintiff.

Murray-Aynsley, J.—

His Lordship dealt with the facts and continued:—

The guiding principle in dealing with cases of this kind is that great caution should be exercised in admitting documents alleged to have been executed by illiterate persons. Those who obtain I.O.U's. and other documents can and should have execution witnessed by persons of such a character that further dispute is impossible. If they do not do this they have only themselves to blame. Where there is serious ground for suspicion such a document should not be accepted. In this case examination of the documents produced and reading the evidence must produce a very strong suspicion. The Plaintiff has to prove his case and in view of these matters I do not consider that he has done so. The appeal must be allowed and judgment entered for the Defendant-Appellant with costs here and below.

Appeal allowed with costs.

[ORIGINAL CIVIL JURISDICTION]

MURRAY-AYNSLEY, J.

July 22, 1938.

TASIR BIN ITAM DRIS

v.

JAMILA AND OTHERS.

(PERAK CIVIL SUIT No. 118 of 1937)

Limitation Enactment, Article 92—specific performance on happening of a contingency—no notice of refusal of performance.

A contract was to be performed upon the happening of a contingency. The contingency happened more than three years prior to the date of institution of the suit. There was no notice of refusal of performance.

Held, that the word "date" in Article 92 of the Schedule to the Limitation Enactment (Cap. 18) does not

include the happening of a contingency and that, as there was in this case no notice of refusal of performance, the claim was not barred by limitation.

TRIAL OF ACTION.

M. S. Mahendran, for the Plaintiff.

J. A. Thivy, for Defendants Nos. 1 and 2.

Cur. Adv. Vult.

Murray-Aynsley, J.—In this case the Plaintiff as assignee seeks for specific performance of a contract for the sale of land. The only question is whether the suit is barred by limitation. The appropriate article here is No. 92 for which time runs from "the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused."

In the present case the contract was to be performed upon the happening of a contingency, viz "when the title to the land has been obtained." This contingency happened in 1918. There was no notice of refusal outside a period of 3 years. I cannot regard the wording of the article as very fortunate particularly when it is compared with that of article 47. Is the word "date" limited in meaning to a specified day or does it include the happening of a contingency?

In certain Indian cases attempts have been made to bring cases into the first half of the provision on the principle of "*ad certum est quod certum reddi potest*", but although the Courts have not uniformly rejected the contention I have not been able to find a case where it has been applied. In my opinion in construing a Statute of Limitation whoever raises such a plea must show that the case falls within one or other of the articles. It certainly seems unsatisfactory that a claim for specific performance should survive where a claim for damages would be barred but that must be taken to have been the intention of the legislature.

Judgment for Plaintiff and costs.

Judgment accordingly.

[APPELLATE CRIMINAL JURISDICTION]

MURRAY-AYNSLEY, J.

November 28, 1938.

LAI TIN - - - Appellant
v.
PUBLIC PROSECUTOR - - Respondent.
(PERAK MAGISTRATE'S CRIMINAL APPEAL

No. 86 of 1938).

Penal Code, S. 304 A.—causing death by a rash act—degree of negligence.

The degree of negligence required to support a conviction under Section 304A of the Penal Code is not the same as, and in no way comparable to, that required to support a conviction for manslaughter under English Law. Where the facts of a case disclose a substantial and serious degree of negligence that would be sufficient to support a conviction under the section quoted above.

MAGISTRATE'S CRIMINAL APPEAL.

The Appellant was charged under Section 304A of the Penal Code and convicted and fined \$200-00.

The material portion of the Magistrate's Grounds of Judgment is as follows:—

"Although there is a fair amount of authority as to what constitutes manslaughter by negligence in English Law there is no good authority that I can find which gives one any indication of the degree of negligence required to justify a conviction under Section 304A. I will say at once that I do not consider the accused's negligence here sufficient to justify a verdict of manslaughter according to English law. I think it approaches close to, but still falls short of, what is there required. I do think though that it falls within the scope of Section 304A. I find no authority (other than that of text book writers) to tell me that the same degree of negligence is required. Obviously a high degree of negligence is needed but that exists here. The difference is simply that I do not think that this accused was guilty of what has been termed "wicked" negligence."

The appeal was on this ground:—

"The Magistrate having found as a fact that there was no 'wicked' negligence was wrong to convict the accused under Section 304A."

H. Y. Teh for Appellant refers to *Ratanlal*, on Law of Crimes, 14th Edition page 761, where it is stated that the object of Section 304A is to supply a provision for the punishment of what English law called manslaughter by negligence. He also refers to *Gour's* Penal Code, 4th Edition, page 1615. The degree of negligence is well defined in English law. He refers to the following cases:—

Rex vs. Finney, 12 Cox 625.

Rex vs. Noakes, 4 F & F 920.

Rex vs. Bateman, 19 Cr: App: Reports 8.

Rex vs. Doherty, 15 Cox: 306.

It is only necessary to refer to one Indian Case and that is the case of *Idu Bej* reported in 3 Allahabad 776.

He submits that all the authorities clearly show that to justify a conviction under Section 304A there must be wicked or gross negligence.

Brodie, Assistant legal adviser for the respondent:

To take a car out on the road with its brakes so maladjusted as to cause the car to swing violently